

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 978	DATE	8/8/2006
CASE TITLE	USA vs. Marzook, et al		

DOCKET ENTRY TEXT

The government's motion for an anonymous jury is denied without prejudice.

■ [For further details see text below.]

Docketing to mail notices.

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The government has moved the Court to empanel an anonymous jury to hear the case against Defendants Muhammad Salah and Abdelhaleem Ashqar. The government argues that the nature of the charges and evidence will place jurors in reasonable apprehension for their safety. It also contends that the highly publicized nature of the case raises additional concerns. For the reasons discussed below, the government's motion is denied without prejudice.

The Second Superseding Indictment (the "Indictment") charges Defendants Salah and Ashqar with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (Count I); Defendant Salah with knowingly providing and attempting to provide material support and resources to a Foreign Terrorist Organization, namely, Hamas, in violation of 18 U.S.C. § 2339B (Count II); both Defendants with obstructing justice, in violation of 18 U.S.C. § 1503 (Counts III & IV), and Defendant Ashqar with refusing to comply with a Compulsion Order when appearing before the Grand Jury, in violation of 18 U.S.C. § 401(3). The charges are premised upon and related to Defendants' alleged support of the Hamas terrorist organization, both prior to and after the United States designated Hamas as a Specially Designated Terrorist Organization and a Foreign Terrorist Organization. The Indictment alleges that Hamas has called for violent terrorist attacks, and engaged in numerous terrorist attacks aimed at Israeli military personnel, police officers, and civilians. It alleges that Defendant Salah has provided material support to Hamas, including recruiting and training new Hamas leaders and disbursing money to support Hamas activities.

The decision to empanel an anonymous jury is within the discretion of the trial court. *United States v. Crockett*, 979 F.2d 1204, 1215 (7th Cir. 1992), *cert. denied* 507 U.S. 998, 113 S.Ct. 1617, 123 L.Ed.2d 176 (1993). The empanelment of an anonymous jury, however, "is an extreme measure that is warranted only where 'there is strong reason to believe the jury needs protection.'" *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002), *cert. denied* 538 U.S. 967, 123 S.Ct. 1761, 155 L.Ed.2d 522 (2003), citing *Crockett*, 979 F.2d at 1215. In assessing whether to empanel an anonymous jury, a court must balance the defendant's

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interest in conducting meaningful voir dire and in preserving the presumption of innocence against the jurors' interest in their own security and the public's interest in an impartial verdict. *Id.* at 650. The Seventh Circuit has made clear, however, that "neither the right to a presumption of innocence nor the right to exercise peremptory challenges is a constitutional absolute; each, at times, must yield to the legitimate demands of trial administration and court-room security so long as steps are taken to ensure that the defendant receives a fair trial." *Id.* Specifically, a court can compensate for the disadvantage caused by the exclusion of potential jurors' names, addresses, neighborhoods and places of employment by conducting a conscientious "searching and thorough" voir dire. *Id.* at 652 (quoting *Crockett*, 979 F.2d at 1216). In order to mitigate the harmful effects on the defendant's presumption of innocence, a court's jury instructions should emphasize that the defendant enjoys that presumption. *Id.* at 652. To further alleviate potential prejudice, a court should give the jury an appropriate cautionary explanation regarding their anonymity status. *See, e.g., Crockett*, 979 F.2d at 1216-17 (instruction implying that their status was not in response to threats by defendant, but rather a procedure by which federal courts avoid contact between jurors and the parties to ensure a fair and impartial verdict).

The Seventh Circuit has articulated the following factors that district courts should consider when determining the propriety of an anonymous jury: "the defendant's involvement in organized crime; his participation in a group with the capacity to harm jurors; whether he previously has attempted to interfere with the judicial process; the severity of the punishment that the defendant would face if convicted; and whether publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment." *Mansoori*, 304 F.3d at 650-51. Participation in an entity with means to intimidate without "something more" is insufficient to justify the use of an anonymous jury. *Crockett*, 979 F.2d at 1216 (quoting *United States v. Vario*, 943 F.2d 236, 241 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992)). "'Something more' can be a demonstrable history or likelihood of obstruction of justice on the part of the defendant or others acting on his behalf or a showing that trial evidence will depict a pattern of violence by the defendant and his associates such as would cause a juror to reasonably fear for his own safety." *Crockett*, 979 F.2d at 1216.

Here, the government has not presented evidence that either Defendant has a history or likelihood of obstruction of justice or has previously attempted to interfere with the judicial process to the extent necessary to warrant the empaneling of an anonymous jury. The obstruction of justice and contempt charges in the Indictment – namely Defendant Ashqar's alleged refusal to testify before two grand juries, and Defendant Salah's alleged material falsehoods in sworn answers to interrogatories in a separate civil case – do not indicate a likelihood of intimidation or harassment of jurors to justify empaneling an anonymous jury. *Cf. Mansoori*, 304 F.3d at 651 ("True, the defendants may have had the ability to intimidate jurors through associates who were not incarcerated, but that is true of many defendants. What demonstrates the need for jury protection is not simply the means of intimidation, but some evidence indicating that intimidation is likely."); *United States v. DiDomenico*, 78 F.3d 294, 301-302 (7th Cir. 1996) (defendant members of the Chicago Outfit whose "specialties" were intimidation and bribery of public officials warranted anonymous jury); *Crockett*, 979 F.2d at 1216 (evidence indicated that one potential witness had been murdered and that attempts had been made to influence or intimidate other witnesses); *United States v. Aulicino*, 33 F.3d 1102, 1116 (2d Cir. 1995) (evidence indicating bribe of \$50,000 and a Mercedes if witness did not testify and that if offer were rejected witness would be killed); *United States v. Wong*, 40 F.3d 1347, 1376-77 (2nd Cir. 1994) (evidence included past killing of several witnesses by gang); *Vario*, 943 F.2d at 240 (defendant's co-conspirator was charged with grand jury tampering); *Tutino*, 883 F.2d at 1132-33 (defendant personally involved in past grand jury tampering). Neither the allegations of Defendant Ashqar's refusal to offer court-

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immunized testimony nor the allegations that Defendant Salah lied in an answer to an interrogatory or court pleading alone indicates that the Defendants or their co-conspirators are likely to intimidate, bribe, coerce, or otherwise unduly influence jurors in the instant case.

The government also relies on allegations of apparent witness tampering. The Court previously addressed this issue and denied the government's motion to revoke Defendant Salah's bond on this basis. The government did not present any evidence linking these allegations to Defendant Salah, and did not present sufficient evidence to support a finding for an anonymous jury.

The government argues that the nature of the charges is such as to place jurors in reasonable apprehension for their safety. Specifically, the government states that the racketeering activity includes charges of state murder conspiracy and material support of a violent terrorist organization. "Before a district judge may rely on the organized crime connection of a defendant as a factor in the question of anonymous juries, he must make a determination that this connection has some direct relevance to the question of juror fears or safety in the trial at hand..." *Vario*, 943 F.2d at 241. The Seventh Circuit has affirmed that "mere invocation of the words 'organized crime,' 'mob,' or 'Mafia,'" is not sufficient motive to empanel an anonymous jury. *Crockett*, 979 F.2d at 1216 (citing *Vario*, 943 F.2d at 241). Similarly, the mere invocation of the word "terrorism," without more, is insufficient to warrant such an anonymous jury.

Furthermore, the alleged violent activity is not directly relevant to the question of the jurors' reasonable apprehension of fear in the trial. The government admits that "there presently is not affirmative evidence suggesting that Hamas would act to harm sitting jurors to a criminal matter in the United States." (R. 571-1; Govt.'s Mot. for an Anonymous Jury at 5.) The state murder conspiracy charge and the violent terrorist activity that the government cites in its brief allegedly took place in Israel. Neither of the two Defendants directly participated in the violent acts. None of the details revealed in the Indictment indicate that Defendants or their associates have planned or are planning any terrorist-related activities in the United States. In addition, the government admitted when the Court initially set the bond for each Defendant in this case that neither Defendant was a danger to the community.

Without evidence establishing a history or likelihood of obstruction of justice on the part of either Defendant, or others acting on their behalf, that supports a likelihood of intimidation or harassment of the jurors, the government cannot meet the Seventh Circuit's standards for empaneling an anonymous jury in this case. The Court, therefore, need not analyze the other factors. The Court denies the government's motion without prejudice based on the record before it.

Defendant Salah suggests that the Court order the names and biographical information of the jurors be designated as "sensitive" and placed under a protective order for only the Court, counsel, and Defendants to have access. The other parties did not respond to this suggestion. The Court shares the concerns regarding publication of biographical information of jurors and will address this issue at the next status hearing.